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17 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

18
19 IN RE KOREAN RAMEN ANTITRUST
20 LITIGATION

Case No. 3:13-cv-04115-WHO

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22
BRIEF REGARDING THE QUESTIONING
OF BONG-HOON KIM ABOUT THE
ISSUES OF EMBEZZLEMENT AND THE
CENTRAL DISTRICT LITIGATION

23 This Document Relates to:

24 ALL ACTIONS
Date: November 20, 2018 (7:30 am)
Courtroom: 2, 17th Floor
Judge: Hon. William H. Orrick

On November 16, 2018, this Court addressed Defendants' attempts to raise issues of alleged embezzlement by Mrs. Jung-Soo Kim (the "2018 Investigation"), especially with regard to cross-examination of Bong Hoon Kim. The Court originally stated that "[t]here's no evidence that BH Kim was high enough in Samyang structure to know about the embezzlement, and nothing that defendants have identified shows the link they want to make. It's more prejudicial than probative, so I'm going to keep it out." Trial Tr. (11/16/18) at 459:6-10. Defendants responded that they "have a theory, a line of query, that as we referenced in our brief last night we did not put in our papers because we didn't want to have to tip our hand to opposing counsel and have it be presented to the witness before we actually conducted the investigation." Id. at 459:15-19. The Court then explained that, "before we start the cross-examination[of Bong-Hoon Kim] we'll take a break, then send the jury out, and then you can lay it out at sidebar and we'll sort it out." Id. at 461:3-5 (emphasis added).

Defendants originally sought to question and/or impeach Mrs. Jung-Soo Kim concerning the 2018 Investigation. This issue became moot when Mrs. Kim was excluded by this Court on November 11, 2018. ECF No. 785, at 2. However, Defendants have tried to keep the issue of Mrs. Kim's embezzlement alive, and they now seek to diminish Bong-Hoon Kim's credibility by seeking to "impeach" him with the purportedly dishonest conduct of another person.

Defendants have previously raised an implausible theory about motive to fabricate evidence of a price-fixing conspiracy. According to Defendants, a 32-page KFTC document from March 2014, titled the “Plenary Meeting Resolution”, demonstrates that Mrs. Kim lied about a price-fixing agreement to distract from an unrelated embezzlement scheme. See Plaintiffs’ Opposition Brief Regarding Relevance of Embezzlement At Samyang Korea And Motion In Limine Concerning Any Mention Of Embezzlement. [ECF No. 809] While this theory was barely plausible as to Mrs. Kim, who was accused of embezzlement, it has even less plausibility as to Bong-Hoon Kim, who has not been subject to such accusations.

Furthermore, this Court has already held that, as of April 2018, Defendants have not demonstrated how an unrelated case previously pending in the Central District of California between

1 Samyang USA and Samyang Korea (the “Central District Litigation”) is relevant to this case. April
 2 24, 2018 Order, ECF No.740 at 22-23. Defendants have not provided any additional reasoning
 3 demonstrating the relevance of the Central District Litigation, especially as it pertains to Bong Hoon
 4 Kim, and they should be prevented from cross-examining him about it.

5 **ARGUMENT**

6 **A. The Plenary Meeting Resolution Is Inadmissible**

7 For the reasons previously set forth in Plaintiffs’ Opposition Brief Regarding Relevance of
 8 Embezzlement At Samyang Korea And Motion In Limine Concerning Any Mention Of
 9 Embezzlement [ECF No. 809] at 2:9-4:8, the Plenary Meeting Resolution dated March 3, 2014 (Trial
 10 Ex. 892), contains no reliable information, is not subject to judicial notice under Fed. R. Evid. 201,
 11 and contains multiple levels of hearsay without exception. Defendants have subsequently provided
 12 no further reasoning to support its admission into evidence.

13 **B. Defendants Have No Basis To Question Bong-Hoon
 14 Kim About Mrs. Kim’s Alleged Embezzlement**

15 Defendants may seek to impeach Bong-Hoon Kim under Fed. R. Civ. P. 609, because Mrs.
 16 Kim has, in Defendants’ words, pled guilty to embezzlement. However, this supposed guilty plea of
 17 Mrs. Kim cannot be used to impeach Bong-Hoon Kim. As stated in *Walden v. Georgia-Pacific*
 18 Corp., 126 F.3d 506 (3d Cir. 1997):

19 Criminal acts are relevant to a witness’ credibility only if that witness actually
 20 participated in the criminal conduct. It strains logic to argue that an employee’s
 21 credibility is properly brought into question by the mere fact that he or she is
 presently employed by a corporation that in some unrelated manner was guilty of
 dishonest acts, no matter how egregious those acts may have been.

22 *Id.* at 523. Here it isn’t even Bong-Hoon Kim’s employer Samyang that has been found guilty of the
 23 dishonest acts in question. It is Samyang’s owners, Mrs. Kim and Mr. Chun, who have made certain
 24 purported admissions concerning embezzlement. It should be noted that because Mrs. Kim and Mr.
 25 Chun allegedly embezzled from Samyang itself, Samyang is the alleged victim of this crime, and not

1 a participant. Accordingly, impeaching Bong-Hoon Kim for Mrs. Kim's wrongdoing is improper
 2 under Fed. R. Evid. 609.

3 Second, Defendants may try to inquire as to whether Bong-Hoon Kim was involved in
 4 knowingly facilitating Mrs. Kim and Mr. Chun's embezzlement. But there is no evidence of that, and
 5 so impeachment under Fed. R. Evid. 608 is improper.

6 Third, Defendants might try to inquire as to Bong-Hoon Kim's motive to fabricate testimony
 7 to this Court. However, as stated above, there are no allegations of embezzlement or any other illegal
 8 activity by Bong Hoon Kim, or even Bong Hoon Kim's employer, Samyang. Accordingly, under Fed
 9 R. Evid. 404(b),¹ any alleged embezzlement by Mrs. Kim or Mr. Chun can't be imputed to either
 10 Bong-Hoon Kim (who has not been accused of embezzlement) or the Samyang entity itself (who is
 11 the victim of the alleged embezzlement), and doesn't give any rise to any motive by Bong Hoon Kim
 12 to testify untruthfully in this case.²

13 ¹ Fed. R. Evid. 404(b) of the Federal Rules of Evidence provides that “[e]vidence of a crime, wrong,
 14 or other act is not admissible to prove a person’s character in order to show that on a particular
 15 occasion the person acted in accordance with the character,” Fed. R. Evid. 404(b)(1), but “[t]his
 16 evidence may be admissible for another purpose, such as proving motive, opportunity, intent,
 preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” Fed. R. Evid.
 404(b)(2).

17 ² There is doubt that Fed. R. Evid. 404(b) can apply to misconduct of a corporation:

18 An intriguing question is whether Rule 404(b) prohibits proof of other
 19 wrongdoing by corporations. While the word “person” can be read to include
 20 corporations and other entities, the later reference to “he” sheds some doubt on
 21 this interpretation. Moreover, the rule bars misconduct only as proof of
 22 “character” and it is doubtful that corporations have this attribute. However,
 23 there are a number of prior decisions applying the exclusionary other crimes rule
 24 to corporate defendants, though none of these show any awareness of the issue. It
 25 is also possible to disregard the corporate entity and to analyze the issue solely in
 terms of proof of other conduct of the particular corporate agents involved.
 Postcodification cases have not addressed this issue directly. It should, however,
 be noted that some other acts may be admissible to prove “routine practice”
 under Rule 406.

26 *Security Nat'l Bank of Sioux City, Iowa v. Abbott Laboratories*, No. C 11-4017-MWB, 2013 WL
 12140998, at *13, n.3 (N.D. Iowa, August 13, 2013) (quoting 22A Fed. Prac. & Proc. Evid. (2d ed.)
 27 § 5239 (Other Crimes, Wrongs, or Acts—General Rule)).

1 Furthermore, impeachment by way of a corporate witness, using any method, is improper
 2 unless the examiner has, in accordance with Fed. R. Evid. 402, met the threshold of demonstrating
 3 relevancy of the alleged misconduct or motive to the claims at issue. See *Security Nat'l Bank of*
 4 *Sioux City, Iowa v. Abbott Laboratories*, No. C 11-4017-MWB, 2013 WL 12140998, at *14 (N.D.
 5 Iowa, August 13, 2013). And even if some potential relevance could be articulated, for reasons set
 6 forth above, any inquiry in front of the jury to Bong Hoon Kim about the 2018 Investigation would
 7 be more prejudicial than probative under Fed. R. Evid. 403.

8 **C. Defendants Should Be Precluded From Cross-Examining**
 9 **Bong-Hoon Kim About The Central District Litigation**

10 Defendants may also try to suggest through examination of Bong Hoon Kim that because
 11 Samyang Korea issued blanket “denials” of certain allegations of conspiracy in Central District
 12 litigation pleadings, Bong Hoon Kim must likewise have taken that position. *See e.g.*, Answer to
 13 Samyang USA’s First Amended Complaint filed in the Central District Litigation on May 31, 2016
 14 (the “Samyang Answer”)(Trial Ex. 835). This is improper for several reasons.

15 First, as this Court has previously held, the Central District Litigation is irrelevant to the
 16 claims here. April 24, 2018 Order. ECF No. 740 at 22-23. Defendants have provided no additional
 17 evidence to warrant a different result now.

18 Second, the filings in the Central District Litigation were not verified by Bong Hoon Kim or
 19 anyone else at Samyang, so there is no reason to believe that Bong Hoon Kim was even aware of (1)
 20 any of the pleadings in the Central District Litigation, including the Samyang Answer, (2) the
 21 information contained in those pleadings, or (3) the reason for these blanket denials in the Samyang
 22 Answer.

23 Third, the reason that Samyang Korea made blanket denials of certain allegations in the
 24 Samyang Answer is unclear, and was certainly preliminary to full-blown fact discovery in the case.
 25 The Samyang Answer provided blanket denials to many of the allegations, often without explaining
 26 which element or elements of in each allegation Samyang Korea was denying. It should be noted

1 that the conspiracy allegations are premised on findings by the KFTC, which had been revoked by
2 the time the Answer was filed. Given this ambiguity, the information provided by the blanket denials
3 in the Samyang Answer are all but useless, and cannot be interpreted as an attempt by Samyang
4 Korea to affirmatively deny the existence of a conspiracy. During discovery in the Central District
5 Litigation, Mrs. Kim testified that a conspiracy, in fact, existed.

6 Fourth, Defendants should not be able to cross-examine Bong-Hoon Kim about the Samyang
7 Korea's alleged "sham distribution agreement" with Samyang USA. Defendants have not
8 demonstrated how Bong Hoon Kim had any involvement in the creation of the distribution
9 agreement, or how his relationship to SYUSA would provide some evidence of fraud that could be
10 used for impeachment purposes.

CONCLUSION

12 For the foregoing reasons, Defendants inquiries into, or references about, the following topics
13 should be prohibited during the examination or cross-examination of Bong-Hoon Kim: (1) the 2018
14 Investigation or any allegations of embezzlement against Mrs. Kim or Mr. Chun; or (2) assertions
15 that Samyang Korea denied the existence of a price-fixing conspiracy in the Central District
16 Litigation. The Court should also prohibit Defendants from cross-examining Bong-Hoon Kim on the
17 Plenary Meeting Resolution (Trial Ex. 892) or the pleadings in the Central District Litigation (Trial
18 Exs. 833-45).

DATED: November 19, 2018

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